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OVERVIEW OF PERMITTING OF OIL AND GAS WELLS IN COLORADO: UNDERSTANDING THE DOCTRINE OF PREEMPTION AND THE AUTHORITY OF "HOME RULE MUNICIPALITIES"

By Ralph A. Cantafio, Esq.[1]

Colorado has witnessed the increased and combined use of hydraulic fracturing ("fracking") along with horizontal drilling during the last several years. During this same time oil and gas development has increasingly encroached upon areas of population density. This has resulted in significant conflict involving the permitting of oil and gas wells. While an independent topic of value might include an environmental paper describing the fracking process, the purpose of this paper is to provide general background information so as to understand the permitting process and how this creates a host of legal issues of significance to county representation. Understanding the permitting process is particularly valuable for our county representatives to better understand the legal doctrine of Preemption. Preemption addresses the preeminence of State regulatory structures. Understanding how Preemption conflicts with and can be read in conjunction with the independent regulatory powers of counties and municipalities, referred to as "Home Rule" authority, is important as this is the basis of litigation in our Colorado Courts, especially that of Longmont.

This paper will begin by generally setting forth the Colorado Oil and Gas Conservation Commission ("COGCC") permit process for oil and gas wells, including specifics as to what that process entails. No oil and gas well can be drilled without first securing a COGCC Permit. The second part of this paper will outline areas of legitimate local regulation as applied to oil and gas development. Having explored the relative authority of state and county to regulate, we will next move through legal authority and case law in Colorado attempting to reconcile these two important legal theories of Preemption and Home Rule. We will examine how these might be read both together or in conflict depending upon the circumstance. Lastly, there will be a review of two separate litigations involving the City of Longmont that are moving through our Colorado District Courts.

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REGULATORY PROCESS FOR PERMITTING OIL AND GAS WELLS

It is the COGCC that has exclusive authority over the permitting of an oil and gas wells in Colorado. It is important to recognize that no oil and gas well can move forward without the approval of an Application for a Drilling Permit ("ADP") by the COGCC. As will be explained in this paper, there exist other permits and approvals from local authorities that must often also be secured prior to being able to move forward with drilling.

Some of the COGCC requirements can be said to "form based". A basic understanding of the more important COGCC forms provides significant assistance in understanding the permitting process for oil and gas drilling.

As the reader shall learn, there exists a process of application submittal. There is the application review to move a given project to fruition. Like many regulatory processes, above and beyond the traditional regulatory process there also exist additional processes that sometime are required. These include Hearings before the COGCC, the seeking and securing of various exceptions, the successful completion of Mechanical Integrity Tests ("MIT's"), the providing of Bradenhead Tests, the successful passing of static bottom hole pressure tests, the providing of water well samples, the submission of accident reports where such occur, the providing of spill reports where such occurs, the submittal of remediation work plans, the submission and approval of storm water programs, the providing of centralized exploration and production ("E&P") reports, the securing of waste management facility permits, the securing of comprehensive drilling plan approvals, and the receipt of underground injection well permits - to name just a few. These are mentioned here not so much because these will be required as to every single well, but to underscore that this presentation focuses of a generic, simplified permitting process. This paper does not focus upon any comprehensive or even representative application process.

Let's begin.

Prior to drilling in Colorado all oil and gas well operators, gatherers, transporters, levy payers, seismic operators, financial insurance providers, and others involved in oil and gas exploration, production, development and transportation must complete Form 1: Registration for Oil and Gas Operations. This Form 1 provides basic information such as the name, address and other factual information publishing base data thereby identifying the "players" engaged in the industry in the State of Colorado.

Every entity involved in the oil and gas process must also complete a Form 1A: Designation of Agent. This Form provides contact information so that lines of communication are constantly open making the entire COGCC system more responsive to the state, operators, and private citizens. Without first submitting the Form 1 or the Form 1A, the processing and approval of APD's will not move forward.

Part and parcel with submitting Form 1and Form 1A, there are also forms involving financial assurance. One can think of these financial assurances as primarily bonds. The posting of Bonds is required prior to the moving forward with any well, seismic, centralized waste management, or gas gathering facilities. Financial assurance is first reviewed and ultimately approved by COGCC staff[2].

Presuming compliance with Form 1 and Form 1A, the seminal document leading to development is Form 2: Application for Permit to Drill, Deepen, Recomplete, Re- Enter, and Operate. The APD approval is required prior to the drilling of any new well as well as the extending of an existing well into a new formation. It the approval of Form 2 which allows the actual down hole construction of the well. The operator when submitting the APD includes data that will be first entered into the COGCC workflow database. This data can be submitted to COGCC on paper or electronically. So that the location of any well is conspicuous, its location must be staked and surveyed prior to submitting the APD.

Once submitted, the APD is preliminarily is screened by permit staff to confirm completeness. If the initial review reveals deficiencies in the Application, a permit staff representative will contact the operator, typically by telephone or email, requesting additional information. The Operator in then afforded an additional 30 days to respond. This typically results in the Operator providing the additional supplemental information.

Once the APD passes the initial review, data is relocated from the COGCC external workflow database to the COGCC workload database on the COGCC internal server. Upon satisfaction of this original screening, permit staff will post notice of the completed Form 2 on the COGCC website. Permit staff will also simultaneously provide notice to the local government designee and, as appropriate, to the Colorado Department of Wildlife ("DOW") as well as the Colorado Department of Public Health and Environment ("CDPHE").

At this point in time, permit staff is now joined by COGCC engineering staff to conduct additional and heightened review. Should deficiencies be found, the operator again has 30 days to respond. Typically, the operator does respond to answer questions posed or provide additional information. If there is no response from the Operator or the response is not adequate, the APD can be tabled by staff after those 30 days. It is also during this period after posting notice that public comment is invited, received and reviewed. Public comment ultimately will be posted on the COGCC website. Transparency is thus an important part of the permitting process. Issues involving public health, safety, and welfare are considered during the permit process. Conditions of approval, including special conditions, are included as such may be appropriate.

[2] At the end of the life of a well approximately one-half (1/2) of all bonds submitted are not approved for release upon completion of a project. The release of bonds at the conclusion of a project will depend upon successful completion of a Preparation of Release Letter, an actual review of remaining operations (including onsite inspection), and the submission of the actual bond for the purpose of release.

Presuming permitting and engineering staff find the APD to be adequate, the APD is now ready for Director of COGCC consideration and approval. Even after any Director approval, the APD is still subject to a 10 day appeal period before being formally issued.

A Form 2 cannot be approved in less than 21 days. On the other end, an operator can request a prompt Hearing as to approval of a pending APD after 75 days. It is noteworthy that if conditions of approval are required as part of a permit the operator can within this same 10 day period appeal these conditions by requesting a Hearing. Local governments as well as surface owners have standing within these 10 days to request a Hearing. Recent case law has established that third parties, such as Environmental Groups, do not have any ability to request a Hearing.

Of course, the approval of any APD does not end the permitting process. The approval of a Form 2-A: Location Assessment is required prior to the building of any well pad as well as any other oil and gas facility. This makes certain that impacts to the public, environment, and wildlife are minimized. The COGCC must approve the Form 2-A. Like the APD, the COGCC may also attach special conditions to any approval. Much like with the APD, upon submitting the Form 2-A COGCC permitting staff performs an initial completeness review. If the Form 2A is deemed to be sufficient, such will pass initial review. If deficiencies are noted, the operator is notified and has 30 days to respond. Once initial review has been passed, permit staff posts the Form 2-A on the COGCC website and, as with the case of the APD, provides notice to local government, and, as appropriate, to the CDOW and CDPHE. After posting on the COGCC website Form 2A, permit staff as well as the Oil and Gas Location Assessment staff ("OGLA") review the application in detail. If deficiencies are found, the operator will have 30 days to correct any deficiency or otherwise respond. Failure of an operator to adequately to respond can result in the Form 2-A being tabled by staff after 30 days.

The OGLA staff conducts an environmental review. OGLA staff can schedule an onsite visit as appropriate. Once reviews are complete and conditions of approval considered, the Form 2-A will be forwarded to the Director of the COGCC for approval. Upon any approval, there is the same 10 day appeal period that must elapse prior to any formal issuance of the permit. Like the APD, Form 2-A's cannot be approved in less than 21 days. An operator can request a Hearing after 75 days if no ruling is received. Any of the operator, local government representative, or surface owners can request a Hearing within 10 days to Appeal a permit or to raise appropriate issues.

The "nuts and bolts" of the drilling process are contained in Form 5: Drilling Completion Report. This form includes a description of the "as built" construction of the well in question. This Form 5 contains significant scientific information, including that identifying geological formations. Directional surveys are required as appropriate. Retention of cement tickets is required so that the cement "in the hole" may be subject to verification. Records of casing and cementing data "in the hole" are also kept. Information recording the time of spud, reaching the total depth and the setting of the casing and plugging is required. So too is information as to the drilled location of the top of production and the bottom hole locations. Information pertaining to the actual drilled depth and plugged back depth is also required. Records of drill stem test results and core analysis must be kept. One can see that a host of scientific data must be provided and ultimately retained.

Permitting staff and engineering staff have various obligations to ensure that the information contained in the Drilling Completion Report is accurate. The operator must submit all information within 30 days after completing the well. Even after this original information is provided, the reporting requirements for an Operator are far from complete. A Form 5A: Completed Interval Report must be submitted for each formation that is completed or attempted to be completed during the course of the life of the well. This Report must be provided if a well is re-perforated, re-stimulated or there is a change of status. Upon submittal of a Form 5A, COGCC permitting staff has an obligation to compare the Form 5A information with the APD to verify from actual well file information confirming information as to completed formations and other data. An operator is required to submit Reports within 30 days from completing a formation; whether such efforts are successful or not. Such Reports must also be provided when a formation is temporarily or permanently abandoned, as well as upon recompletion, re-perforation, or re-stimulation.

Once a well is operational, the Operators must now report monthly. Form 7 requires reporting as to every well for each month from the day the well is completed through the life of the well, until one month after the well is plugged. This information includes well status, production volume, and the number of days the well is active for each month. So as to understand the sheer volume of information being submitted to COGCC, approximately 45,000 Reports are received each month. As one might appreciate, the review of each of these documents by the COGCC is all but impossible.

At the conclusion of the life of a well a Form 6: Well Abandonment Report must be submitted. This Form 6 must be provided both immediately before and after a well is plugged and abandoned (so called "P&A"). The Well Abandonment Report includes an Intent to Abandon and subsequent Report of Abandonment. The exercise of abandoning a well includes the providing of engineering reports that outlines the details as to the original construction of the well bore, information as to aquifers above the well bore, and the identifying of producing zones in the well bore. This is provided so staff can accurately determine the appropriate depth of the cement plug. This process insures that oil, gas, and water are confined to the reservoir in which such is originally found[3]. A subsequent Report of Abandonment providing cement tickets (including the volume, depth and quality) of cement allows confirmation that the P&A is completed properly. No actual plugging occurs until after approval of the COGCC. No bond is released until final inspection by COGCC has been completed.

As one can see, this COGCC permitting process is technical in nature. It is also a very thorough process.

At this point, some counties decline to require any further approval and no further significant permitting is sought (other than perhaps those involving use of roads and the like). On the other hand, the operator in many instances will also have to satisfy municipal regulations or county regulations prior to drilling. We explore local regulation in the next section.

[3] The COGCC estimates that 90% of all Forms 6 submitted require correction by staff. Plugs are frequently scheduled to be set at incorrect depths.

COUNTY REGULATION OF THE OIL AND GAS INDUSTRY

While this paper will in the next two (2) sections more meaningfully explore the legal tension between Preemption and Home Rule, an overview pertaining to appropriate areas of local regulation is appropriate. In the most generic sense, the right of local government, including municipalities and counties, to tend to their own affairs is referred to as the right to "Home Rule". Broadly speaking, "Home Rule" permits a county or municipality to regulate issues that are of local concern. Customarily, matters involving land use have been seen as local in nature. It is held traditionally in juris prudence that local governmental entities are in a much better position to regulate land use issues than those of state or federal governments. Local government is thought to better equipped to address interests pertaining to land use in a fashion much more in tune with the will of their immediate population. Thus, restriction pertaining to the use of real property has been decided typically by local government, not otherwise.

The legal issue involving whether it is a local governments regulatory scheme that conflicts in operation with a state statutory or regulatory scheme is known as "Operational Conflict". First taking a step back from legal analysis is appropriate.

As a matter of local government, argument can be made as to whether or not local government ought to be able to establish regulations including, but not limited to, water quality, soil erosion, wildlife and vegetation, livestock, geological hazard, wildfire protection, recreation, drainage and erosion, livestock and livestock grazing, water of body setbacks, cultural and historic resources, and impact mitigation. As such applies to the oil and gas industry, the analysis at some level involves whether or not these subject matters are areas of legitimate regulation by local government or whether local government is using these traditionally local concerns as an indirect attempt impede and interfere with oil and gas development. The former is an acceptable use of Home Rule, the latter is not.

Local government has access to extremely sophisticated legal counsel and other consultants. Local government would rarely be so unwise as to draft a regulation outright articulating that the local regulation at issue was being implemented so as to thwart or somehow obstruct the oil and gas industry. Local regulation can be nuanced to the extent that even if the objective of a given regulation was meant to obstruct the oil and gas industry, it would be hard to find a set of circumstances where such would be intentionally articulated. This is not to state that there do not exist many legitimate areas of local government concern where regulations are enacted with an eye towards legitimate protection of the health and safety of the local population. Merely because a regulation might impact the oil and gas industry does not in any manner imply that passage of regulation is consistent with any untoward objective. The law in Colorado is such that merely because a local regulation creates impact on the oil and gas industry does not necessitate a conclusion that such is not lawful based upon "same-subject analysis".

Obviously, a treatise could be drafted pertaining to local regulation. The objective in this part of the paper is to merely provide the basic foundation so as to explain regulation within the context of "Home Rule" against the backdrop of the basic mandates of the COGCC pertaining to the regulate oil and gas wells.

PREEMPTION RIGHTS OF THE COGCC & THE RIGHTS OF LOCAL GOVERNMENT

What is "Preemption" as such applies to the oil and gas industry?

A bit of history is first required. The Colorado General Assembly in 1951 when it created the COGCC vested the COGCC with exclusive regulatory authority over oil and gas development entrusting this new entity with regulating oil and gas operations. See C.R.S. §34-60-105(1). The Colorado General Assembly specifically relegated authority to the COGCC and "…unqualifiedly conferred upon the Commission" authority to administer state law related to oil and gas conservation. There existed many reasons to approach regulation on a statewide basis, but one of the significant grounds was to make sure there existed a single, statewide set of rules as to the development of oil and gas to promote efficiency.

Simply put, where exclusive jurisdiction has been granted to regulate, attempts by others to likewise regulate the subject matter in question are not permitted as they are said to be "Preempted."

The issue as to Preemption as it applies to the COGCC and its right to regulate the oil and gas industry is nothing new to litigation in the State of Colorado. There exists a long line of cases that explore Preemption. There is no attempt here to review all of these cases. Instead, the battle lines pertaining to Preemption and the relative rights of the COGCC *vis-à-vis* other governmental entities were significantly established by two separate Opinions pronounced by the Colorado Supreme Court each issued on June 8, 1992: Voss v. Lundvall Brothers, Inc., 830 P.2d 1061 (Colo. 1992) and Board of County Commissioners, La Plata County v. Bowen/Edward Associates, Inc., 830 P.2d 1045 (Colo. 1992). A review of these cases assists in a better understanding of the Doctrine of Preemption as such applies to oil and gas. This will later assist understanding how the actions of Longmont will likely be treated by the Colorado courts.

In Voss, *supra*, the Greeley City Council prohibited the drilling of any well for the purpose of exploration or production of any oil or gas or other hydrocarbons within the corporate limits of Greeley. The ordinance was to become effective subject to its adoption and approval by the electorate of Greeley at its regular municipal election scheduled for November 5, 1985. The Lundvall Brothers instead filed a lawsuit seeking Declaratory Judgment asking that the Court find the Greeley ordinance be null and void. The District Court of Weld County agreed with the Lundvall Brothers granting them Summary Judgment finding that the Greeley ordinance was facially void as "the entire area of oil and gas exploration regulation, including sites within municipalities had been preempted by the State of Colorado and such regulation delegated to the COGCC such that there existed no area of regulation of oil and gas exploration to be left to Greeley." Up until this time, that interpretation of the District Court of Weld County was consistent with what many understood to be the state of affairs as to the regulation of oil and gas in Colorado. More specifically, oil and gas regulation was the sole responsibility of the COGCC.

The case was appealed and ultimately found its way to the Colorado Supreme Court. Its conclusions lay the groundwork for the current legal dispute. The Colorado Supreme Court began by

recognizing that pursuant to Article XX, Section 6 of the Colorado Constitution ("the Home-Rule Amendment"), Home-Rule cities such as Greeley reserved "the full right of self-government in both local and municipal matters." Juxtaposed against the right to Home-Rule, the Colorado Supreme Court noted that the State simultaneously possessed an interest in oil and gas development and regulation of its operations all as expressed in the Act. Citing the simultaneously published case of Bowen/Edward, the Colorado Supreme Court summarized the general authority conferred upon the COGCC by the Colorado Assembly:

> In addition to issuing permits for oil and gas drilling operations, the Commission is authorized to regulate the drilling, production, and plugging of wells, the shooting and chemical treatment of wells, the spacing of wells, and the disposal of salt water and oilfield wastes … [cite omitted] … as well as limit production from any pool of field for the prevention of waste and to allocate production from a pool or field among or between tracts of land having separate ownership on a fair and equitable basis so that each tract will produce no more than its fair and equitable share…(See Bowden/Edwards, *supra,* at 1049, Voss, *supra,* at 1065).

However, the Colorado Supreme Court did not presume there to exist an absolute ban prohibiting non-COGCC regulation that might affect oil and gas development. The Colorado State Court relied upon other existing Colorado case law that here was presented a case of "mixed" interests:

> … in matters of mixed local and state concern, a home-rule municipal ordinance may co-exist with a State statute as long as there is no conflict between the ordinance and the statute, but in the event of a conflict, the State statute supersedes the conflicting provision of the ordinance. (Voss, *supra,* at 1066).

Finding the Greeley ordinance to address an area of mixed local and state concern, the Colorado Supreme Court relied upon a four factor test (see City and County of Denver v. State of Colorado, 788 P.2d 764 (Colo. 1990)) so as to resolve the dispute as to whether the State's interest in prohibiting a municipality from adopting a regulation Preempted action by the City of Greeley or whether these instead were circumstances where there existed sufficient justification to permit home-rule regulation. The Colorado Supreme Court relied upon a test based upon: (1) whether there is a need for statewide uniformity of regulation; (2) whether the municipal regulation has an extra territorial impact; (3) whether the subject matter is one traditionally governed by state or local government; and (4) whether the Colorado Constitution specifically committed the particular matter to State or local regulation. (Voss, *supra,* at 1007).

The Colorado Supreme Court in deciding this case seized upon the first factor listed above finding:

> … because oil and gas production is closely tied to a well location, Greeley's total ban on drilling within the city limits could result in uneven

> and potential wasteful production of oil and gas from pools which underly the city but extend beyond the city to land where production is not prohibited by a total drilling ban. Greeley's total ban, in that situation, would conflict with the Colorado Oil and Gas Conservation Commission's express authority to divide a pool of oil or gas into drilling units and to limit the production of the pool so as to prevent waste and to protect the correlative rights of owners and producers in the common source or pool to a fair and equitable share of production profits. (Voss, *supra*, at 1067).

The Court ultimately concluded:

> … the State's interest in efficient oil and gas development and production throughout the state, as manifested in the Oil and Gas Conservation Act, is sufficiently dominant to override a home-rule city's imposition of a total ban on the drilling of any oil, gas, or hydrocarbon wells within the city. (Voss, *supra*, at 1068).

We can thus see where in Voss that the legal foundation of the Doctrine of Preemption as applied to for oil and gas industry is beginning to erode. The Colorado Supreme Court significantly "opened the door" allowing non-COGCC oil and gas regulation stating in both Bowden/Edwards and simultaneously referencing in Voss:

> … the State's interest in uniform regulation of these and similar matters, however, does not militate in favor of an implied legislative intent to preempt all aspects of a county's statutory authority to regulate land use within its jurisdiction merely because the land is an actual or potential source of oil and gas development and operations. The State's interest in oil and gas activities is not so patently dominant over a counties interest in land use control, nor are the respective interests of both the state and county so irreconcilably in conflict, is to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes … (Bowen/Edward, *supra*, at 1058 and Voss, *supra*, at 1068).

Ultimately, the Colorado Supreme Court decided Voss against Greeley, but makes a curious finding:

> If a home-rule city, instead of imposing a total ban on all drilling within the city, enacts land use regulations applicable to various aspects of oil and gas development and operations within the city, and if such regulations do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals of the Oil and Gas Conservation Act, the city's regulation should be given affect … (Voss, *supra*, at 1068-1069).

We see from Voss that the Doctrine of Preemption is ultimately utilized. However, the legal analysis is significantly broadened allowing consideration of a broader breadth of potential regulation.

In light of Voss, *supra*, a short discussion of Bowen/Edward is next appropriate. Whereas the City of Greeley enacted a complete ban on oil and gas development, La Plata County enacted regulations so as to categorize oil and gas facilities into minor facilities, minor facilities requiring special mitigation processing, and major facilities with each category subject to distinct application requirements concerning land use impact. La Plata County adopted a set of regulations that the Colorado Supreme Court divided into three (3) separate categories: (1) those containing "land use coordination standards," the purpose of which was "to minimize conflicts between differing land uses; (2) those involving performance standards containing "environmental quality standards" intended to "balance economic development with protection of the environment and natural resources; and (3) those involving performance standards in "surface disturbance" intended "to encourage minimal damage to surface activities and surface conditions." Bowden/Edwards, *supra*, at 1051.

The La Plata County position is clearly much more innovative and sophisticated than an outright ban.

Bowen, Edwards and others, filed a Complaint for Declaratory and Injunctive Relief taking the position that the Act conferred exclusive authority upon the COGCC to regulate oil and gas development and operations throughout the state. This was a classic argument for Preemption. In response, La Plata County took the legal position that the Act did not preempt all local land use regulations and that these land use regulations as adopted were within the scope of La Plata County's legislative authority. Ultimately, the Colorado Supreme Court rejected the Preemption argument finding:

> … while the governmental interests involved in oil and gas development and in land use control at times may overlap, the core interests in the legitimate governmental functions are quite distinct. The State's interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources in this State. A county's interest in land use control, in contrast, is one of orderly development and use of land in a manner consistent with local demographic and environmental concerns. Given the rather distinct nature of these interests, we reasonably may expect that any legislative intent to prohibit a county from exercising its land use authority over those areas of the county in which oil development or operations are taking place or are contemplated would be clearly and unequivocally stated. We, however, find no such clear and unequivocal statement of legislative intent in the Oil and Gas Conservation Act. Bowden/Edwards, *supra*, at 1057.

The case was ultimately remanded (returned) for further proceedings in the District Court noting:

> On the basis and limited record before us, we are unable to determine whether an operational conflict exists between La Plata County's oil and gas regulations and the Oil and Gas Conservation Act. The purpose of the County's regulations is to "facilitate the development of oil and gas resources within the unincorporated area of La Plata County while mitigating potential land use conflicts between such development and existing, as well as planned, land uses" … This statement of purpose evinces an obvious intent to regulate in a manner that does not hinder the achievement of the state's interest in fostering the efficient development, production, utilization of oil and gas resources in this State. … the county regulations thus appear to be designed to harmonize oil and gas development and operational activities with the State's overall plan for land use and with the State's interest in those developmental and operational activities. (Bowden/Edwards, *supra*, 1059-1060).

While there have since been other published opinions by the Colorado Appellate Courts as to the application of Preemption, these two cases continue some twenty (20) years later to substantively define the legal framework to resolve legal issues related to Preemption.

As set forth earlier in this paper, the issue pertaining to Operational Conflict cuts to the heart of the analysis utilized by Colorado Courts to determine whether or not a local regulation conflicts with the doctrine of Preemption. A short discussion of Gunnison County v. BDS International, 159 P.3d 165 (Colo. App. 2000) is appropriate.

In this instance, Gunnison County filed lawsuit against a natural gas producer, BDS International, LLC ("BDS") asking that the District Court of Gunnison County, Colorado enter an injunction prohibiting BDS from maintaining or drilling wells without first coming into compliance with numerous county regulations. Gunnison County had previously enacted a series of local regulations as part of the Application Submittal Requirements for Oil and Gas Permits including: wildlife and wildlife habitat analysis, vegetation, water quality, drainage and erosion control plans, drainage and erosion control, livestock and livestock grazing, recreation impacts, water quality, water body setbacks, cultural and historic resources, wildlife hazard, geological hazard, impact mitigation costs, access to roads, and financial guarantees.

The Colorado Court of Appeals in Gunnison County citing Bowen/Edwards observed:

> "A county regulation in a state statute will both remain in effect as long as there express or implied conditions do not irrevocably conflict with each other." (See Gunnison County, *supra*, at 778).

That Court further invoked the operation conflicts test previously set forth in Bowen/Edwards:

> …There may be instances where the counties regulatory scheme conflicts in operation with the state statutory or regulatory scheme. For example, the operational effect of the county regulations might be to impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety regulations or land restoration requirements contrary to those required by state law or regulation. To the extent that such operational conflicts might exist, the county regulations must yield to the state interest. See Gunnison County, *supra,* at 778.

The Colorado Court of Appeals in Gunnison County found:

> We will construe the county regulations, if possible so as to harmonize them with the applicable states statutes or regulations. When no possible construction of the county regulations may be harmonized with the state regulatory scheme, we must conclude that a particular regulation is invalid … A statute will preempt a regulation where the effectuation of a local interest would materially impede or destroy the state interest… Therefore, a county may not impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed by state law or regulation… Gunnison County, *supra,* at 779.

Significant portions of the case were remanded back to the District Court in that the Court of Appeals found inadequate underlying information in the Court record to make a decision. The Court of Appeals noted:

> Because the counties drainage and erosion regulations attempt to remove the states interest of protecting the land and topsoil without imposing conflicting requirements, they are not, on their face, contrary to state law, and a Hearing is required to determine any operational conflicts. Gunnison County, *supra,* at 781.

Along those same lines, regulations pertaining to wildlife and vegetation, livestock, geological hazards, cultural and historic resources, as well as recreation also necessitated Hearings before the District Court.

As one can see based upon Gunnison County, the issue as to whether or not there is an Operational Conflict between local regulation and the COGCC such that any issue is one of local concern or whether such regulation is Preempted is an analysis that must be made case by case based upon the both the facts presented and the regulation imposed. The ultimate resolution of this issue can be extremely subtle.

LONGMONT LITIGATIONS

It is Longmont that is the latest arena of dispute involving the identity of which governmental entity has the ultimate responsibility to regulate fracking in Colorado.

Over the past 60 years, there have been periodic attempts by local government, typically municipalities and counties, to establish their own regulations of the oil and gas industry. However, these attempts have been relatively dormant over the past 20 years until more recently at which time fracking became more commonplace. More specifically, there became popular concern as to perceived negative environmental impacts resulting from fracking. An entire paper discussing the dynamics of public perception pertaining to fracking could be drafted and this topic is touched upon in a limited fashion at the conclusion of this paper. Irrespective, misplaced or not, it is this current public perception as often fueled by environmental groups and popular media that have now created concern pertaining to the safety of the fracking process. The implication of this approach is that the COGCC is either unwilling or unable to protect the interests of local populations necessitating the intervention of the local government.

While these same environmental concerns can also be noted nationwide, it is Longmont that has arisen as perhaps the most visible in this dispute. Longmont is a "Home-Rule" city governed by the City of Longmont Home Rule Charter. Geographically, Longmont is situated in both Boulder and Weld Counties. It is also located in the Wattenberg Area, the most productive area for oil and gas in Colorado.

On December 20, 2011, Longmont imposed a 120-day moratorium on accepting applications for oil and gas well permits within city limits in large part as a response to concerns about fracking. This moratorium was initially scheduled to expire on April 17, 2012, but was ultimately extended until June 16, 2012. On February 10, 2012 and within the initial period of the oil and gas moratorium, Longmont released its draft of its then most recent generation of oil and gas regulations. In response, the Director of COGCC along with other members of the commission staff met with a representative of the City of Longmont to express the significant concern of the COGCC that certain of these draft regulations were Preempted by the Act. The legal doctrine of Preemption will be discussed shortly.

In the months thereafter, Longmont issued several drafts of amended proposed regulations. In each instance, the COGCC continuously communicated its continuing concerns that certain rules as proposed were Preempted by the Act. Despite the opposition of the COGCC, in May, 2012, Longmont conditionally approved oil and gas regulations. Mike King, in his capacity as the Executive Director of the Department of Natural Resources and in response to this conditional approval, corresponded to Longmont noting that "these oil and gas regulations are contrary to the statewide public interest as long ago adopted by the Colorado General Assembly." Mr. King further communicated that instead of Longmont acting unilaterally, there ought to be a coordinated effort between Longmont and the COGCC to regulate. Longmont thereafter delayed final passage of its regulations, but extended its oil and gas

moratorium for yet another 45 days. However, on July 17, 2012, the Longmont City Council approved its ordinance over the objection the COGCC adopting new local oil and gas regulations[4].

On July 30, 2012, the Attorney General of the State of Colorado on behalf of the COGCC filed its Complaint for Declaratory Relief[5] requesting that the District Court of Boulder County find that, among other things, these newly adopted rules and regulations as passed by Longmont be found to be Preempted by the Act.

The dispute as to the relative power to regulate oil and gas between Longmont and the COGCC did not end at that point.

On July 20, 2012, a Petition was presented to the Longmont City Council asking that a special election be held on November 6, 2012 seeking amendment of the Longmont Home-Rule Charter so as to now specifically prohibit hydraulic fracking and the storage in open pits or disposal of solid or liquid wastes created in connection with hydraulic fracturing in Longmont. By virtue of Resolution R-2012-67, the Longmont City Council put to vote the following question:

> "Shall the City of Longmont Home-Rule Charter be amended by adding a new Article XVI to prohibit within the City of Longmont the use of hydraulic fracturing to extract oil, gas, or other hydrocarbons, and prohibit within the City of Longmont the storage in open pits or the disposal of solid or liquid wastes created in connection with the hydraulic fracturing process, including, but not limited to, flow back or produced waste water and brine?"

This was ultimately referred to as Ballot Question 300. A bit less than a million dollars in campaign contribution was raised both for and against the passage of this fracking ban. Essentially, the dispute pitted an organization by the name of "Our Longmont" (for the resolution) against "Main Street Longmont" (against the resolution). In November 2012, approximately 60% of the voters of Longmont approved this fracking ban. On December 6, 2012, Governor Hickenlooper announced that as to Ballot Initiative 300, unlike the position taken by the State involving the passage of rules and regulations by Longmont's City Council, the State would not bring its own litigation against Longmont pertaining to the action of its voters. The State would instead support a lawsuit initiated by others contesting this vote.

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[4] These new regulations included a right to assess the appropriateness of oil and gas practices, impose additional conditions of approval as to vertical, horizontal and multiwall sites, ban surface operations in residential zoning districts, impose water sampling requirements, impose minimum setbacks, and require compliance with local habitat and species protection.

[5] Declaratory Relief allows a Judge to determine the status of an issue in controversy. Declaratory Relief does not involve a request for damages, but seeks to define the rights of the parties as to an underlying legal dispute. These new regulations included a right to assess the appropriateness of oil and gas practices, impose additional conditions of approval as to vertical, horizontal and multiwall sites, ban surface operations in residential zoning districts, impose water sampling requirements, impose minimum setbacks, and require compliance with local habitat and species protection.

On December 17, 2012, the Colorado Oil and Gas Association ("COGA") filed its Complaint with the District Court of Weld County initiating a legal action seeking Declaratory Judgment so as to invalidate the results of the Special Election of November 6, 2012. One of the significant legal grounds depended upon the COGA in this lawsuit is that of the Preemption.

On December 17, 2012, the Colorado Oil and Gas Association ("COGA") filed its Complaint with the District Court of Weld County initiating a legal action seeking Declaratory Judgment so as to invalidate the results of the Special Election of November 6, 2012 (See Exhibit B). One of the significant legal grounds depended upon by COGA in this lawsuit is that of the Preemption.

Currently, both cases are pending. The second Longmont case has since been removed from Weld County to Boulder, Colorado.

CONCLUSION

The tension between Home Rule and Preemption along with the application of tests involving Operational Conflict is both subtle and complex. The goal of this paper is to raise the awareness of the reader as to how the permitting of oil and gas wells works with both the COGCC and local regulation placing this dispute in a legal context.

As the population of Colorado grows and because oil and gas development is more frequently encroaching into more densely populated areas, these legal issues will almost certainly increase in number as time goes by. It is hoped that by addressing these issues in this paper, you in the role of a local government representation as well as that of a citizen of the State of Colorado will have a better appreciation for the scope and intellectual underpinning of this set of issues.